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Case No.: 2001-BLA-00796

In the Matter of

VITO CERULLO
Claimant

v.

AUSTIN POWDER COMPANY
Employer

and

PAGNOTTI ENTERPRISES o/b/o
LEHIGH VALLEY ANTHRACITE
and **CONSTITUTION STATE SERVICE CORPORATION**
Employer/Insurance Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Harry T. Coleman, Esq.
For Claimant

Stephen F. Moore, Esq.
For Austin Powder

Ross A. Carroza, Esq.
For Pagnotti Enterprises

Maureen Russo, Esq.
For the Director, OWCP

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Black Lung Benefits Act, 20 U.S.C. § 901, et seq., ("the Act") and the regulations issues thereunder, which are found in Title 20 of the Code of Federal Regulations. Benefits are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of such coal miners. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

The claimant, Vito Cerullo, filed a claim for benefits on June 5, 2000. (DX 1).[1] The Director named Austin Powder Company ("Austin Powder"), and Pagnotti Enterprises o/b/o Lehigh Valley Anthracite ("Pagnotti") as putative responsible operators. (DX 15, 16). The record shows that Claimant worked for Lehigh Valley from 1963 to 1973, and Austin Powder from 1973 to 1984. (DX 3). Austin Powder controverted liability, stating that they are "a blasting company and not the owner or operator of any mines." (DX 19). Pagnotti controverted liability, stating that they are not the operator with whom Claimant had the most recent period of cumulative employment of one year, and that they did not operate a mine or other covered facility for any period after June 30, 1973. (DX 18).

The Director denied Claimant's application for benefits on August 4, 2000. (DX 11). An informal conference was held on January 9, 2001. (DX 25). In addition to affirming the denial of benefits, the Director determined that Austin Powder is the responsible operator, but refused to dismiss Pagnotti since Austin Powder disputed liability. *Id.* Claimant appealed the denial of benefits and requested a formal hearing. (DX 26). A hearing was held before me in Wilkes-Barre, Pennsylvania, on December 6, 2001, at which time the parties were given the opportunity to present evidence and argument under the Act and the regulations issued thereunder. The record was left open after the hearing to permit submission of additional evidence. Closing briefs from the parties were received by February 27, 2002.

[1] The following references will be used herein: "TR" for the hearing transcript, "ROX" for Responsible Operator Exhibit, "DX" for Director's exhibit, and "CX" for Claimant's exhibit.

ISSUES

The issues remaining for adjudication are:

(1) the length of Claimant's coal mine employment,
(2) whether Claimant has pneumoconiosis,
(3) whether Claimant's pneumoconiosis arose out of coal mine employment,
(4) whether Claimant is totally disabled,
(5) whether Claimant's total disability is due to pneumoconiosis, and
(6) who the Responsible Operator is in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

Claimant was born on July 15, 1936. (DX 4). His wife, Marion, is his only dependent for the purpose of benefit augmentation under the Act. (DX 5). Claimant testified that he worked for Pagnotti from 1963 to 1973 driving a truck, jack hammering, oiling on a drag line, and blasting in coal strip mines. (TR at 40, 49-50). He then worked for Austin Powder from 1973 to 1983 performing blasting work in coal strip mines. (TR at 31); (DX 3). Claimant testified that Austin Powder manufactured explosives, but did not own any of the mines he worked at; the mines were owned by another company named Beltrami. (TR at 33, 52, 57). In order to remove the overburden from its coal strip mines, Beltrami purchased explosives from Austin Powder. *Id.* As part of Beltrami's purchases, Austin Powder provided Claimant and a 'helper' to conduct blasting at Beltrami's mines. *Id.* at 33, 52, 57, 59. Claimant would place fuel oil and bags filled with ammonium nitrate in bore holes, and blast away the overburden. *Id.* at 31-32. These bags weighed between fifty and sixty pounds. *Id.* at 42. His other duties included driving the trucks holding the ammonium nitrate and unloading it from railroad cars. *Id.* at 32-33.

At the hearing, Claimant stated that he has "slight" difficulty breathing, but that he is not treated, nor seen his family physician for it. *Id.* at 35. He has difficulty walking more than six blocks, sleeps on two pillows, and leaves the window open at night. *Id.* at 37, 65. However, he stated that can still hunt,[2] cut the grass, and shovel snow. *Id.* at 65-66. He testified that until he quit sixteen years ago, he smoked up to a pack of cigarettes per day "off and on" for thirty years. *Id.* at 43.

[2] In fact, Claimant testified that he went hunting the day before the hearing. (TR at 65).

Controlling Law

Claimant filed for benefits under the Act on June 23, 1999. (DX 1). Therefore, since this claim was filed subsequent to the effective date of the permanent criteria of Part 718, (i.e. March 31, 1980), the regulations contained in 20 C.F.R. Part 718 (2001) will govern its adjudication.

Length of Coal Mine Employment

There is no question that Claimant worked at a "coal mine" as defined by the Act and associated regulations, *see* 30 U.S.C § 802(h)(2); 20 C.F.R. at § 725.101(a)(12), nor is it contested that Claimant was a "coal miner". (DX 36).

However, Claimant bears the burden of proof in establishing the length of his coal mine employment ("CME"). *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). Claimant's coal mine work history must be computed in accordance with § 725.101(a)(32) in order to determine if he is entitled to any of the presumptions contained in Part 718. *See* 20 C.F.R. at § 718.301. To the extent the evidence permits, the Administrative Law Judge must ascertain the beginning and ending dates of all periods of coal mine employment. 20 C.F.R. at § 725.101(a)(32)(ii). The regulations state that the dates of CME may be established by any credible evidence. *Id.*

Under the new regulations, a year of CME "means a period of one calender year . . . , or partial periods totaling one year, during which the miner worked in or around coal mines for at least 125 'working days.'" *Id*. at § 725.101(a)(32). A "working day" is any day or part of a day for which a miner received pay for work as a miner. *Id.* If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calender year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. *Id.* at § 725.101(a)(32)(i). If a miner worked fewer than 125 working days in a year, he shall be credited for working a fractional year based on the ratio of the actual number of days worked to 125. *Id.*

The Benefits Review Board ("the Board") has held that such computations should be based on some reasonable method with the result supported by substantial evidence in the record considered as a whole. *Wilkerson v. Georgia Pacific Corp.*, 1 BLR 1-830, 1-835 (1978). The length of coal mine employment may be established exclusively by the claimant's own testimony where it is uncontradicted and credible. *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-345 (1984). However, Social Security records may be accorded more weight if a claimant's testimony is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984).

Claimant testified that he worked for Lehigh Valley Anthracite (Pagnotti) from 1963 until 1973, and for Austin Powder from 1973 until 1983. Social Security records indicate that Claimant worked for Lehigh Valley Anthracite from the third quarter of 1963 until the second quarter of 1973. (DX 3).

They also indicate that Claimant worked for Austin Powder from the second quarter of 1973 until sometime in 1984.[3] *Id.* Based upon Claimant's testimony and Social Security records, I credit Claimant with twenty (20) years of CME from 1964 to 1983.

However, there is insufficient evidence for me to determine how many days Claimant worked as a coal miner in 1963 and 1984. Section 725.101(a)(32)(iii) provides a formula for calculating the number of days a coal miner has worked using his yearly wages and the coal mine industry's average daily earnings for that year.[4] Using Claimant's Social Security records, (DX 3), application of this formula results in 79 days of CME in 1963 and 22 days in 1984. This translates into ten (10) months of CME under § 725.101(a)(32)(i). Thus, I find that Claimant's total CME is twenty (20) years and ten (10) months.

Determination of the Responsible Operator

The Director and Pagnotti argue that Austin Powder should be named the responsible operator. Austin Powder argues that since it is a manufacturer and distributor of explosive materials, and never owned any coal mines, it cannot be the responsible operator.

The applicable regulations state that an "independent contractor performing services at [a coal] mine" is considered a coal mine "operator". 20 C.F.R. § 725.491(a) (2000).[5] An independent contractor which is deemed an "operator" may be held liable for payment of benefits to an employee who worked in or around coal mines in the "extraction, preparation, or transportation of coal . . . in any period during which such employee[] [was] exposed to coal dust during their employment with such contractor." *Id.* at § 725.491(c)(1).

In addition, the Benefits Review Board ("the Board") has interpreted the Act to include as operators those independent contractors having a continuing presence at a mine, but not to include those having only a *de minimis* or sporadic contact with a mine or companies merely providing incidental services to mines. *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356, 1-358 (1985).

In *Ritchey*, the employer argued that it was not the responsible operator because it never owned, operated, leased, supervised, or controlled a mine or mine facility. *Id.* at 1-357. The employer

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[3] The records reflect only yearly earnings after 1977.

[4] Section 725.101(a)(32)(iii) requires that a copy of the Bureau of Labor Statistics (BLS) table that is used in this calculation be made part of the record. Accordingly, I have placed a copy into the record as ALJ 1.

[5] Since this case was pending at the time the amended Part 725 regulations took effect, the "old" regulations concerning designation of the responsible operator, 20 C.F.R. §§ 725.491 - 725.493 (2000), apply. *See* 20 C.F.R. § 725.2 (2001).

was in the business of leasing heavy equipment such a bulldozers and highlifts. *Id.* As part of its business, the employer also provided equipment operators to its customers. *Id.* The claimant in *Ritchey* worked for the employer for nine years as a bulldozer and highlift operator at a coal mine. *Id.* Even though the claimant worked for the employer, his day-to-day activities were supervised by employees of the coal mine. The ALJ's determination that the employer was the responsible operator under this set of facts was upheld by the Board. *Id.*

The assertions of Austin Powder concerning the nature of its business are unquestioned. However, although Austin Powder did not own the mines Claimant worked at, they were an "independent contractor" providing blasting services as part of its sale of explosives to Beltrami. Beltrami could not extract coal from its strip mines without Claimant blasting the overburden away. Claimant testified that he spent his entire ten year tenure with Austin Powder working at Beltrami's facilities, and that he was exposed to coal dust. (TR at 31-32, 34-35, 53-54, 69). He also stated that Beltrami determined what areas of the mines Claimant would conduct blasting. *Id.* at 59. It is clear that Austin Powder's presence at Beltrami's mines was continuing, and Claimant's services were essential to the extraction of coal. Based on these facts, the applicable regulations, and the Board's decision in *Ritchey*, I find that Austin Powder was a coal mine operator.

A coal mine operator is a "responsible operator" if it is determined to be liable for the payment of benefits. 20 C.F.R. at § 725.101(a)(26). However, certain prerequisites must first be met. *See* 20 C.F.R. §§ 725.492(a), 725.493(a)(1) (2000). The first requirement is that the miner's disability must have arisen at least in part out of his employment with the operator. *Id.* at § 725.492(a)(1). In making this determination, there is a rebuttable presumption that the miner was regularly and continuously exposed to coal dust during the course of his employment. *Id.* at § 725.492(c). To rebut this presumption, the operator must show that there were no significant periods of coal dust exposure during the miner's employment. *Conley v. Roberts and Schaefer Coal Co.*, 7 BLR 1-309, 1-312 (1984).

Half of Claimant's twenty-year CME was 'blasting' for Austin Powder and the other half was doing very similar work for Pagnotti. Since Claimant testified that he was exposed to coal dust during his employment with Austin Powder, (TR at 31-32, 69), they could not show there were no significant periods of coal dust exposure. Therefore, if Claimant proves that he is disabled, it arose - at least in part - out of his employment with Austin Powder.

Austin Powder satisfies the remaining requirements § 725.492 since (1) they were an operator after June 30, 1973, (2) Claimant worked for them for at least one day after December 31, 1969; and (3) Austin Powder represented to me, (TR at 25), that it is capable of assuming its liability for the payment of continuing benefits. *See* 20 C.F.R. §§ 725.492(a)(2)-(4) (2000). Accordingly, if Claimant proves his entitlement to benefits, Austin Powder meets the definition of a "responsible operator".

If the requirements of § 725.492(a) are met, the responsible operator is the last operator with which the claimant had the most recent periods of cumulative employment of one year or more. *Id.* at § 725.493(a)(1). Thus, Austin Powder is the responsible operator since Claimant last worked for them for more than a year. Once a responsible operator is identified, § 725.493 provides a rebuttable presumption that the claimant's pneumoconiosis arose out of his employment with such operator. *Id.* at 725.493(a)(6). Unless this presumption is rebutted by showing that the claimant's employment did not contribute or aggravate the disease, *see Yurga v. Bethlehem Mines Corp.*, 5 BLR 1-429, 1-432 (1982), the responsible operator is liable for the payment of benefits should entitlement be established. Again, in light of the fact that *half* of Claimant's CME was 'blasting' for Austin Powder, if Claimant proves the existence of pneumoconiosis, Austin Powder could not rebut this presumption.

Austin Powder also argues that they are not the responsible operator based upon the "borrowed servant doctrine," which imputes workers' compensation liability upon a borrowing employer. *See* 1 B Larson, *Workmen's Compensation Law* § 48.00 (Matthew Bender 1993). The Board has held that the factors articulated in this treatise are appropriate in determining whether an employee is a borrowed servant for purposes of imposing liability pursuant to the Black Lung Benefits Act. *Hoover v. Manor Mines, Inc.*, 17 BLR 1-1, 1-3 (1992).

The first requirement of the borrowed servant doctrine is that the borrowed employee has made a contract of hire, either express or implied, with borrowing employer. *See* Larson, *Workmen's Compensation Law* at § 48.00(a). The Third Circuit Court of Appeals, in *Vanterpool v. Hess Oil Virgin Islands Corp.*, 766 F.2d 117 (1985), has noted the critical nature of this requirement. *Id.* at 122.

There is no evidence in the record that Claimant signed any contract or document in relation to his work at Beltrami's facilities. In addition, the evidence does not show that Claimant felt he worked *for* Beltrami, simply *at* their facilities. Claimant testified that he was a full-time employee of Austin Powder. (TR at 33). Claimant's paychecks and tax information came from Austin Powder. (TR at 66); (DX 3). Claimant, not Beltrami, determined when more explosives were needed from Austin Powder. *Id.* at 57-58. Finally, Beltrami did not pay an extra amount to Austin Powder for Claimant's services, they were included in the price of the explosives. *Id.* at 75. From these facts, I find that there is no evidence that Claimant had a contract, either express or implied, with Beltrami. Therefore, Austin Powder may not rely upon the borrowed servant doctrine to dispute its designation as the responsible operator.

Based on the reasons stated above, if Claimant proves his entitlement to benefits, Austin Powder is the responsible operator. Therefore, it is appropriate to dismiss Pagnotti as a putative responsible operator in this matter.

Entitlement to Benefits: In General

Entitlement to benefits depends upon proof of three elements. In general, a claimant must establish that: (1) he has pneumoconiosis which (2) arose out of his coal mine employment and (3) is totally disabled due to pneumoconiosis. Failure to prove any of these requisite elements by a preponderance of the evidence precludes a finding of entitlement. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *Perry v. Director, OWCP*, 9 B.L.R. 1-1, 1-2 (1986).

Existence of Pneumoconiosis

A living claimant can demonstrate pneumoconiosis by means of: (1) x-rays interpreted as being positive for the disease; or (2) biopsy evidence; or (3) the presumptions described in sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concludes presence of the disease, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function studies, physical exams, and medical and work histories. 20 C.F.R. at § 718.202. This claim arises within the jurisdiction of the Third Circuit since all of Claimant's CME took place in Pennsylvania. Therefore, I must weigh all relevant evidence together in determining whether Claimant has proven the existence of pneumoconiosis. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25 (3d Cir. 1997).

A. X-ray Evidence

Chest x-ray interpretations were submitted into evidence which are relevant to the determination of whether Claimant has pneumoconiosis. Pursuant to my order, the parties were limited to two readings of each of the films of record. The following is a listing of the admissible x-ray readings,[6] together with the names and qualifications of the interpreting physicians:[7]

X-RAY DATE	DATE READ	EXHIBIT	DOCTOR	CONCLUSION
8/8/90	10/24/01	ROX 1-6, 2-5	Scott - bc, b	No Pneumoconiosis

[6] I will not consider certain documents proffered as 'x-ray readings' by Austin Powder in their pre-hearing report: DX 10 from Dr. Iannone and DX 29 from Dr. Monahan do not contain an ILO classification, and ROX 1-8 from Dr. Scott is a CT scan.

[7] The symbol "bc" denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. The symbol "b" denotes a physician who is an approved "B-reader" at the time of the x-ray reading. The symbol "a" denotes a physician who is an approved "A-reader" at the time of the x-ray reading. An A or B-reader is a radiologist who has demonstrated his expertise in assessing and classifying x-ray evidence of pneumoconiosis. However, a B-reader's interpretation is entitled to more weight than an A-reader. *Pavesi v. Director, OWCP*, 758 F.2d 956 (3d Cir. 1985). These physicians have been approved as proficient readers by the National Institute of Occupational Safety & Health, U.S. Public Health Service pursuant to 42 C.F.R. § 37.51 (2001).

8/8/90	10/25/01	ROX 1-7, 2-5	Wheeler - bc, b	No Pneumoconiosis
3/11/99	10/25/01	ROX 1-10, 2-5	Wheeler - bc, b	No Pneumoconiosis
3/11/99	10/24/01	ROX 1-13, 2-5	Scott - bc, b	No Pneumoconiosis
5/16/00	6/20/00	DX 9	Navani - bc, b	Pneumoconiosis 1/0 p,s - all six zones
5/16/00	1/26/01	DX 24	Laucks - bc, b	No Pneumoconiosis
5/16/00	1/19/01	DX 24	Duncan - bc, b	No Pneumoconiosis
5/16/00	1/25/01	DX 24	Soble - bc, b	No Pneumoconiosis
5/16/00	2/2/01	DX 24	Jagannath - bc, b	No Pneumoconiosis
5/16/00	3/5/01	DX 34	Gayler - bc, b	No Pneumoconiosis
5/16/00	3/5/01	DX 34	Scott - bc, b	No Pneumoconiosis
5/16/00	3/6/01	DX 34	Wheeler - bc, b	No Pneumoconiosis
12/21/00	1/10/01	DX 31	Levinson - a	No Pneumoconiosis
12/21/00	5/2/01	ROX 1-12, 2-1	Wheeler - bc, b	No Pneumoconiosis
12/21/00	5/02/01	ROX 1-11	Gayler - bc, b	No Pneumoconiosis
4/20/01	5/23/01	ROX 1-15, 2-4	Jagannath - bc, b	No Pneumoconiosis
4/20/01	4/20/01	ROX 1-14	Ciotola - bc, b	No Pneumoconiosis
4/20/01	5/3/01	ROX 2-4	Laucks - bc, b	No Pneumoconiosis
4/20/01	5/2/01	ROX 2-4	Duncan - bc, b	No Pneumoconiosis
4/20/01	5/3/01	ROX 2-4	Soble - bc, b	No Pneumoconiosis

With the exception of Dr. Levinson, the qualifications of each reviewing physician of record are equal. Since Dr. Navani is the only physician who read one of Claimant's chest x-rays as positive for pneumoconiosis, and every other physician read Claimant's x-rays as negative, I find that Claimant has not proven the existence of pneumoconiosis pursuant to § 718.202(a)(1).

B. Biopsy Evidence

Claimant does not argue that he can establish the existence of pneumoconiosis pursuant to § 718.202(a)(2).

C. The Presumptions

Under § 718.202(a)(3) it shall be presumed that a claimant is suffering or suffered from pneumoconiosis if the presumptions provided in §§ 718.304, 718.305, or 718.306 apply. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis that is not present in this case. Section 718.305 applies only to claims filed before January 1, 1982, and this claim was filed after that date. Section 718.306 is applicable only in the case of a deceased claimant, and this section does not apply in this case. As none of these presumptions are applicable in this case, the Claimant cannot establish the existence of pneumoconiosis pursuant to § 718.202(a)(3).

D. Medical Opinions

Lastly, under § 718.202(a)(4) a finding of pneumoconiosis may be based on the opinion of a physician, exercising sound medical judgment, who concludes that the miner suffers from pneumoconiosis, notwithstanding a negative x-ray. Such conclusion must be based on objective medical evidence such as arterial blood gas studies (ABG), electrocardiograms (EKG), pulmonary function studies (PFS), physical performance tests, physical examinations, medical and work histories, and must be supported by a reasoned medical opinion. 20 C.F.R. at § 718.202(a)(4). A "reasoned" opinion is one that is documented, and the data relied upon is adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR. 1-19, 1-21 (1987). An opinion is "documented" if a physician's clinical findings, observations, facts, and other data are set forth. *Id.*

Dr. Dinesh Talati examined Claimant on June 29, 2000.[8] (DX 8). Claimant's only complaints at this exam were dyspnea upon exertion and that he gets tired after walking four to five blocks. *Id.* He told Dr. Talati that he smoked a pack of cigarettes a day from 1950 to 1965. *Id.* Dr. Talati noted that Claimant's last coal mine job was as a 'blaster', and that he has a twenty-one year history of coal mine employment. *Id.* Physical examination revealed a trace of edema, but good color and no clubbing. *Id.* Claimant's lungs were normal to inspection, palpation, percussion, and auscultation. *Id.* Dr. Talati relied upon Dr. Navani's positive reading of Claimant's May 16, 2000 chest x-ray. *Id.* A PFS performed in conjunction with this examination revealed normal FEV1 and FEV1/FVC values, but moderately reduced FVC and MVV values.[9] (DX 6, 8). Dr. Talati interpreted these results as showing "moderate restrictive ventilatory defect". (DX 6). However, Claimant's efforts were deemed sub-optimal, and Dr. Talati recommended repeating the PFS. *Id.* An ABG study revealed normal values before and after exercise. (DX 7, 8). Based upon this Dr. Talati diagnosed Claimant with simple pneumoconiosis due to coal dust exposure. (DX 8). After reviewing Dr. Talati's report, I find that he has adequately

[8] Since this report was developed before January 19, 2001, the quality standards for physical examination reports contained in § 718.104 (2001) do not apply. 20 C.F.R. at § 718.101 (2001).

[9] Specifically, the FEV1 was 2.08, the FVC was 2.34, the FEV1/FVC was 88%, and the MVV was 56. (DX 6).

documented his opinion. In addition, his opinion is supported by the fact that the x-ray reading he reviewed was positive for pneumoconiosis, Claimant's complaints are consistent with pneumoconiosis, Claimant has a long history of coal mine employment, and the PFS Dr. Talati relied upon showed moderately reduced pulmonary function. Accordingly, I find that Dr. Talati's medical opinion is reasoned.

Claimant submitted a December 5, 2001 letter from his treating physician, Dr. Anees Fogley.[10] (CX 1); (TR at 45). Dr. Fogley is board certified in internal medicine. (CX 2). In its entirety, his letter states:

> Vito Cerullo has been a patient under my care since November 26, 2984. In preparation of this letter I have reviewed his medical records including information submitted by Doctors Dinesh and Talati. I agree that Mr. Cerullo has simple coal workers' pneumoconiosis. Given this fact and in view of his age, he cannot and should not work in any mining job. This would include drilling, blasting, loading, and filling.

(CX 1)

From Mr. Coleman's letter requesting his opinion, it appears that Dr. Fogley was provided with Dr. Navani's positive x-ray reading and Dr. Dinesh Talati's report (not reports from Drs. "Dinesh and Talati"). (CX 1). Aside from his mistaken assertion that he reviewed medical records from two different doctors, and the fact that he failed to document *precisely* what medical records he relied upon, Dr. Fogley's opinion is not reasoned since he failed to explain how the medical data supports his diagnosis. *See Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983). Since his opinion is not reasoned, I accord it no weight. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989).

Dr. Sander Levinson, who is board certified in internal and pulmonary disease medicine, examined Claimant on December 21, 2000.[11] (DX 31). Claimant's chief complaint to Dr. Levinson was shortness of breath over the last two years, but that it was "not real bad". *Id.* He also complained of dyspnea on exertion of walking five to six blocks or when walking up thirty steps. *Id.* Dr. Levinson noted that Claimant has occasional ankle edema and sleeps on two pillows at night. *Id.* Claimant denied having chest pains, hemoptysis, or a significant amount of coughing or wheezing. *Id.* Dr. Levinson took note of Claimant's twenty-two year history of CME. *Id.* Although Claimant relayed to Dr. Levinson an eight year, ½ pack a day, smoking habit, Dr. Levinson noted that the history contained in Dr. Fogley's

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[10] Claimant's medical records from Dr. Fogley, Mercy Hospital, and Dr. Hugo Mori were also submitted into the record. (DX 24, 29). The records from Mercy Hospital and Dr. Mori deal with Claimant's treatment for prostate cancer. (DX 29). Other than the repeated observation that his lungs were clear to auscultation and percussion, these records contain no treatments or diagnoses related to pneumoconiosis. (DX 24, 29).

[11] Since this report was developed before January 19, 2001, the quality standards for physical examination reports contained in § 718.104 (2001) do not apply. 20 C.F.R. at § 718.101. Dr. Levinson also gave a deposition in this matter on October 18, 2001. (ROX 2-6). At his deposition, he repeated and explained his opinion that Claimant does not suffer from pneumoconiosis. *Id.*

records was much higher. *Id.* A physical examination revealed no edema, cyanosis, or clubbing of the extremities, and Claimant's lungs were clear to percussion and auscultation *Id.* Dr. Levinson relied upon various diagnostic tests performed on the date of this exam: an EKG that revealed a normal sinus rhythm, but an abnormal left axis deviation; a PFS that was normal despite only fair efforts on the part of the claimant;[12] negative readings of Claimant's December 21, 2000 chest x-ray from himself, Drs. Lauckes, Duncan, Soble, and Jagannath; and an ABG study which revealed normal oxygenation at rest, and a satisfactory response to exercise. *Id.* Dr. Levinson also reviewed the examination and July 18, 2000 PFS from Dr. Talati.[13] *Id.* Dr. Levinson concluded that Claimant does not have pneumoconiosis. *Id.*

Based on the contents of his report and his deposition, I find that Dr. Levinson has adequately documented his opinion. Also, Dr. Levinson's physical examination, and the diagnostic test results he relied upon, support his conclusion that Claimant does not have pneumoconiosis. Therefore, I find that Dr. Levinson's opinion is reasoned.

Dr. Thomas Dittman, who is board certified in internal medicine, (ROX 1-2), examined Claimant on April 20, 2001.[14] (ROX 1-1). Claimant's complaints were similar to those that he relayed to Dr. Levinson. *Id.* Dr. Dittman relied on a twenty-six year, one pack a day smoking habit. *Id.* He noted that Claimant was employed for twenty-two years in the surface coal mining industry, and that his last job was doing blasting work. *Id.* A physical examination revealed that Claimant's chest was normal to inspection, palpation, percussion, and auscultation. *Id.* Dr. Dittman found a trace of pre-tibial edema, but no leg edema, nor clubbing of the fingers. *Id.* He relied upon an EKG that was normal, a PFS that was normal,[15] an ABG that was normal, and a negative x-ray reading from Dr. Ciotola. *Id.* Dr. Dittman concluded that Claimant does not have coal workers' pneumoconiosis. *Id.*

The revised part 718 regulations contain specific quality standards for medical opinion evidence developed after January 19, 2001 that were not present previously. Since Dr. Dittman's physical examination report was developed after this date, it must be in substantial compliance with the requirements of § 718.104 in order to constitute evidence on the issue of total disability. *See* 20 C.F.R. at §§ 718.101(b), 718.104(a). Section 718.104(a) states that the report must be prepared on a form

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[12] The pre-bronchodilator FEV1 was 3.11, the FVC was 3.38, the FEV1/FVC was 92%, and the MVV was 84. (DX 31). The post-bronchodilator FEV1 was 3.18, the FVC was 3.46, the FEV1/FVC was 92%, and the MVV was 71. *Id.*

[13] Dr. Levinson stated that the results of this PFS were considerably lower than his study, but that the test was invalid since Claimant's efforts were unacceptable. (DX 31). He also reviewed the report of Dr. Robert Kaplan, (DX 31), who found the July 8, 2000 to be invalid. (DX 23).

[14] Dr. Dittman gave a deposition in this matter on November 9, 2001. (ROX 1-3). Dr. Dittman explained and affirmed his diagnosis that Claimant does not have pneumoconiosis. *Id.*

[15] The FEV 1 was 2.80, the FVC was 3.16, the FEV1/FVC was 87%, and the MVV was 75.87. (ROX 1-1).

supplied by OWCP, or in a manner containing substantially the same information. Any report that is not done on the OWCP form must include: (1) the claimant's medical and employment history; (2) all manifestations of chronic respiratory disease; (3) any pertinent findings not specifically listed on the OWCP form; (4) if heart disease secondary to lung disease is found, all symptoms and significant findings; (5) the results of a conforming chest x-ray interpretation; and (6) the results of a conforming pulmonary function study. Since Dr. Dittman's report meets these requirements, I find it to be in substantial compliance with the Part 718 quality standards. I find that his medical opinion is reasoned since it is documented, and the data he relied upon supports his conclusion.

Of the reasoned medical opinions of record, there is one that concludes that Claimant has pneumoconiosis, and two that conclude he does not. First, I note that the results of Claimant's physical examinations, as well as the apparent lack of severity in his breathing complaints, are more supportive of a finding that he does not have pneumoconiosis. In addition, the x-ray evidence of record is more supportive of a finding that Claimant does not have pneumoconiosis. In rendering his opinion, Dr. Talati relied upon the only positive x-ray reading contained in the record. (DX 8, 9). Furthermore, Claimant's normal ABG and PFS results do not support a conclusion that Claimant suffers from any pulmonary impairment.[16] Since the opinions of Drs. Levinson and Dittman are better supported by the objective medical data of record, I accord them more weight than that of Dr. Talati. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Accordingly, I find that the medical opinion evidence does not prove that Claimant has pneumoconiosis.

D. Conclusion

After weighing all the relevant evidence together , I find that Claimant has not proven the existence of pneumoconiosis by a preponderance of the evidence.

ORDER

Since Claimant has not proven the existence of pneumoconiosis, his claim for benefits is DENIED. Furthermore, Pagnotti Enterprises is dismissed as a putative responsible operator in this matter.

A
Ainsworth H. Brown
Administrative Law Judge

[16] Dr. Talati diagnosed "moderate restrictive ventilatory defect" based on the PFS he administered. (DX 6). However, Drs. Kaplan, Levinson, and Dittman stated that the study is invalid, (DX 23, 31); (ROX 1-3 at 28-29), and the diminished values appear unreliable in light of the significantly higher results that were obtained months later by Drs. Levinson and Dittman. *See Andruscavage v. Director, OWCP*, No. 93-3291, slip op. at 9-10 (3d Cir. Feb. 22, 1994); (DX 31); (ROX 1-1).

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to him in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F. R. §725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.